

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

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H. THOMAS CADELL, JR., *Chief Counsel*



July 14, 1994

Mark S. Spring
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Sacramento, CA 95812-3034

Re: **Outside Salesman**

Dear Mr. Spring:

The State Labor Commissioner, Victoria Bradshaw, has asked me to respond to your letter of June 24, 1994, regarding the above-referenced subject.

Your letter asks whether the Division (DLSE) analyses the exemption for outside salespersons for purposes of enforcement of the California IWC Orders any differently than does the federal Division of Wage and Hour for purposes of the FLSA. The answer is yes.

DOL utilizes the "primary duty test" to determine the extent of an exemption from the minimum wage and overtime requirements for, among other classifications, outside salesman. Under this primary duty test certain driver salesmen would be exempt simply because:

"[h]e is employed for the **purpose** of making sales and that he is customarily and regularly engaged in such activity within the meaning of the act and (Part 541 of the C.F.R.)"

Under this definition, the question becomes what the primary duty of the individual consists of. If, for example, the driver salesman were "the only sales contact between the employer and the customers, who calls on customers and takes orders for products which he delivers to the customer from stock in his vehicle or procures and delivers to the customer on a later trip, and who receives compensation commensurate with the volume of products sold, is employed for the purpose of making sales." (29 C.F.R. § 541.505(b)) This definition would not consider the fact that 90% of the work performed by the individual worker might be manual labor loading and unloading in order to stock the vehicle or deliver the goods sold.

The IWC Orders do not purport to exempt "outside salespersons" simply from the minimum wage and overtime provisions of the Orders,

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but exempts this classification from all provisions of the IWC Orders. The IWC does not use the "primary duty" test utilized by the DOL to determine exemption eligibility, and has chosen not to incorporate the "outside salesperson" category within the exemptions which are judged by the "engaged in" test used by the IWC to measure the exemption of most other classifications.

The IWC defines "Outside Salesperson":

"'Outside Salesperson' means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities."

This definition requires that the individual, in order to be exempt, must be (1) engaged in sales (2) away from the employer's place of business more than half of the working hours. Inasmuch as the definition is not subject to the "engaged in" test but is found in the same exemption as the public employee exception, it is clear, the IWC has chosen to adopt a definition of the term "outside salesperson" which is based exclusively upon the definitional language contained in the Order. That definition does not contain any mention of the expanded duties (such as delivery of the goods or the stocking of the vehicle) which are discussed under 29 C.F.R. § 541.5(b).

So long as the individual spends more than half of his or her time away from the employer's place of business and, during that period of time is engaged in sales of tangible or intangible items or obtaining orders or contracts for products, services or use of facilities, the individual is not subject to the IWC Orders. However, if the activities of the individual during the fifty percent of the time involves anything other than sales, the IWC Orders apply to the whole of the individual's employment.

Delivery of goods to a potential or established customer does not affect the status of the individual so long as the delivery activities (which would include stocking, etc.) do not diminish the engaged in actual sales while away from the employer's premises below half of the hours worked.

Also, unlike the limitations set by the federal regulations, sales promotion performed in conjunction with the sales efforts of the outside salesperson is also considered "sales" activity which is exempt. The stocking of a vehicle with samples or advertising material is considered a part of the sales promotion work so long as the "samples" or materials are not sold.

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We hope this adequately addresses the questions you raised in your letter. If you have any further questions please contact the undersigned.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw